Supreme Court, U.S.
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No. 98-158

IN THE
Supreme Court of the United States
October Term, 1998

ELIZABETH TAYLOR GRADY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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ARGUMENT

Contrary to the Government's contentions, the Petition squarely presents important evidentiary issues under Federal Rule of Evidence 801 that are the subject of conflicting rulings in the United States Courts of Appeals. Relying on Sixth Circuit precedent, the Fourth Circuit's decision in this case approved the admission of evidence that would incontestably be inadmissible hearsay in the Ninth, Tenth and First Circuits. This evidence consisted of an unsigned, undated note scrawled on the back of an envelope and found stuffed in a drawer in Petitioner's house with a large quantity of other papers bearing the names of several other persons. This note was admitted, over hearsay and Confrontation Clause objections, solely on the basis that it was in the "possession" of Petitioner. *See* Pet. App. 9a. The Government does not dispute the fact that no evidence of any kind was presented regarding who wrote the note or when, or whether Petitioner ever saw or read the note, much less whether Petitioner acted upon it or responded to it.

The Fourth Circuit's ruling in this case, and the Sixth Circuit decision it relied upon, are fundamentally irreconcilable with the standard that the Ninth Circuit has adhered to for more than seventy years. Under the Ninth Circuit rule, evidence such as this note is inadmissible hearsay "in the absence of proof tending to show that the letter was answered or otherwise acted upon." *United States v. Ordonez*, 737 F.2d 793, 801 (9th Cir. 1983) (quoting *Poy Coon Tom v. United States*, 7 F.2d 109, 110 (9th Cir. 1925)). In accord with the Ninth Circuit, the Tenth and First Circuits also have flatly rejected the rule that possession of a written document is sufficient to manifest adoption of its contents. *See United States v. Jefferson*, 925 F.2d 1242 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991); *United States v. Paulino*, 13 F.3d 20 (1st Cir. 1994).

The Government tries to argue away this direct conflict among the Courts of Appeals, incorrectly contending that the Sixth Circuit's holding in *United States v. Marino*, 658 F.2d

1120 (6th Cir. 1981), which the Fourth Circuit followed in holding that the note was admissible, was mere dictum. This contention ignores the long established rule, recognized by this Court, that an alternate ground for a decision -- such as the Sixth Circuit's ruling in *Marino* that possession constitutes adoption -- is not obiter dictum. Rather, such an alternate ground is a statement of law and has binding precedential value. Thus, notwithstanding the fact that the Fourth Circuit's decision in this case was unpublished, there is a clear conflict among the circuits which merits resolution by this Court. Indeed, where, as here, there is a direct inter-circuit conflict, this Court has not hesitated to review unpublished decisions.

Moreover, the second question presented by this Petition is also the subject of a direct conflict among the Courts of Appeals. The Fourth Circuit's ruling that the note in this case was also admissible as "background" or "circumstantial" evidence conflicts directly with the Tenth Circuit's ruling in *Jefferson* that otherwise inadmissible hearsay, used at trial for the truth of the matter asserted, may not be justified subsequently as admitted to show the circumstantial relationship of the parties to the scene or each other.

Finally, the Government's contention that the error in this case was harmless and that therefore the Court should not grant certiorari is meritless. The note was displayed before the jury in "blown-up" format and was emphasized by the prosecutor in his closing statement as directly supporting Petitioner's guilt. Under any standard, but particularly under the heightened standard of review for constitutional error, which is mandated in this case under the Confrontation Clause, the admission of the note was harmful error.

I. The Fourth and Sixth Circuits Are in Direct Conflict with the Ninth, Tenth and First Circuits Regarding the Proper Standard for Admission into Evidence of a Writing as an Adoptive Statement

Contrary to the Government's assertion, there is a direct conflict between the Fourth and Sixth Circuits and the Ninth, Tenth, and First Circuits regarding the standard for admitting a written document as an adoptive statement under Federal Rule of Evidence 801(d)(2)(b). The Government is incorrect in contending that the Sixth Circuit's ruling in *United States v. Marino*, 658 F.2d 1120 (6th Cir. 1981), that possession constitutes adoption is dictum. *See* Govt. Br. at 8. Rather, the Sixth Circuit provided two alternate grounds for rejecting the evidentiary arguments raised by the appellant in that case. As the Government notes, the Sixth Circuit ruled that the admission of the documents at issue in *Marino* was not plain error. The Sixth Circuit also held, however, that the documents in question were admissible for the truth of the matter asserted "because the defendants' possession of the tickets and the other documents constituted an adoption." *Marino*, 658 F.2d at 1125. As this Court has stated, "[w]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *see also Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) ("It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion."). Thus, "'[i]t has long been settled that all alternative rationales for a given result have precedential value.'" *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (citation omitted). Clearly,

the Sixth Circuit's ruling in *Marino* that possession constitutes adoption is binding precedent and the law of the Sixth Circuit.[1]

The Sixth Circuit's ruling in *Marino* and the Fourth Circuit's ruling in the present case, which follows *Marino*, *see* Pet. App. 13a, are in direct conflict with rulings by the Ninth, Tenth and First Circuits. *See United States v. Carillo*, 16 F.3d 1046, 1048-49 (9th Cir. 1994); *United States v. Ospina*, 739 F.2d 448, 450 (9th Cir. 1984), *cert. denied*, 471 U.S. 1126 (1985); *United States v. Ordonez*, 737 F.2d 793, 799-801 (9th Cir. 1983); *United States v. Jefferson*, 925 F.2d 1242, 1253 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991); *United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994); Petition at 7-13. Indeed, the Tenth Circuit in *Jefferson* recognized the split in authority, explicitly rejecting the rule articulated by the Sixth Circuit in *Marino* and adopting a contrary rule:

> We are aware of the approach taken by the Sixth Circuit in *United States v. Marino*, 658 F.2d 1120, 1125 (6th Cir. 1981), where it held that an airline ticket used at trial to prove that "the defendants traveled in interstate commerce . . . was admissible because the defendants' possession of the documents constituted an adoption." The court stated: "Just as silence in the face of an accusation may constitute an admission to its truth, possession of a written

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[1] Contrary to the Government's contention, the holding in *Marino* has not been modified or overruled by *Poole v. Perini*, 659 F.2d 730, 733 (6th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982). *Poole* did not mention, much less purport to overrule, *Marino*. Moreover, *Poole* did not address the fundamental question presented here -- namely whether mere possession of a written document can constitute affirmative action manifesting adoption of the statements contained in the document.

> statement becomes an adoption of its contents." *Id.* We decline to apply the approach taken by the Sixth Circuit in *Marino* to this case. We can think of too many cases where the mere possession of a [document] in no way constitutes an adoption of its contents.

Jefferson, 925 F.2d at 1253 n.13. The First Circuit in *Paulino* also notes the divergent holdings of the Courts of Appeals and follows the Ninth Circuit's rule as set forth in *Ospina*. *See United States v. Paulino*, 13 F.3d at 24 ("We think that the correct approach, exemplified by *Ospina*, is that 'possession plus' can evidence adoption.").[2]

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[2] The Government incorrectly suggests that there is some question as to whether the note in this case is an assertion for purposes of the hearsay rule. *See* Govt. Br. at 3. As both courts and commentators have explained, this Court "has recognized that statements which plainly imply that a defendant was guilty of a crime for which he is on trial are considered hearsay if made out-of-court and the declarant is not subject to contemporaneous cross-examination in court." *United States v. Reynolds*, 715 F.2d 99, 103-4 (3d Cir. 1983) (discussing *Krulewitch v. United States*, 336 U.S. 440 (1970)); Roger C. Park, *"I Didn't Tell Them Anything About You": Implied Assertions as Hearsay Under the Federal Rules of Evidence*, 74 Minn. L. Rev. 783, 809-810 (1990). As Professor Park points out, in *Krulewitch v. United States*, this Court treated as hearsay the following questions and instructions: "You didn't talk yet?" "Well, don't until we get you a lawyer." "Be very careful what you say." *See* Park, *supra*, at 810; *see also United States v. Palma-Ruedas*, 121 F.3d 841, 857 (3d Cir. 1997) (implied assertions are hearsay), *cert. denied*, 118 S. Ct. 1110 (1998). Moreover, nearly all questions and orders can be recast as declaratory sentences without change of meaning, so that classifying statements as hearsay or nonhearsay based on the grammatical distinction between questions, declaratory sentences and instructions is "highly questionable" and "arbitrary."

(continued...)

The Government also incorrectly suggests that there is no conflict because the Fourth Circuit's opinion in this case was unpublished. In fact, this Court has on numerous occasions granted certiorari to resolve an inter-circuit conflict in cases decided by unpublished decisions, especially where the unpublished decision follows published precedent -- as the Fourth Circuit's decision in this case followed the Sixth Circuit's published opinion in *Marino*. *See, e.g., Lynce v. Mathis*, 519 U.S. 433, 434 (1997) (reversing unpublished 11th Circuit decision); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (reversing unpublished 6th Circuit decision); *Burlington Northern RR Co. v. Oklahoma Tax Commission*, 481 U.S. 454, 460 (1987) (reversing unpublished 10th Circuit decision).[3]

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[2] (...continued)
See Park, *supra*, at 796.

[3] Moreover, as commentators have noted, the large and growing body of unpublished opinions in the Courts of Appeals contains decisions that "are in fact precedential or do have future importance to legal decision makers" and there are "numerous instances of unpublished opinions that in fact did make law." Kirt Shuldberg, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 Calif. L. Rev. 541, 555(1997); *see also* Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 Judicature 307, 313 (1990). To permit such decisions to go unreviewed merely because they are unpublished would create "an underground stream of precedent – unpublished opinions relying on other unpublished opinions." *See* James W. Paulsen & Gregory S. Coleman, *Civil Procedure*, 26 Tex. Tech L. Rev. 397, 440-41 (1995).

II. The Fourth Circuit's Alternate Ruling Admitting the Note as Circumstantial Evidence Is In Conflict With the Tenth Circuit's Decision in *Jefferson*

Contrary to the Government's contention, the Fourth Circuit's alternate basis for admitting the hearsay note, namely as circumstantial or background evidence, is in direct conflict with the Tenth Circuit's decision in *United States v. Jefferson*, 925 F.2d 1242 (10th Cir.), *cert. denied*, 502 U.S. 884 (1991).[4] In *Jefferson*, the Tenth Circuit explicitly rejected the government's argument that evidence which was inadmissible hearsay was nonetheless properly admitted as circumstantial or background evidence.

Jefferson is directly on point with regard to the present case. As in *Jefferson*, the evidence admitted here was admitted not as circumstantial evidence, but was admitted without restriction for the truth of the matter asserted. As in *Jefferson*, the evidence admitted was in fact used by the Government *not* to demonstrate some circumstantial relationship of the parties to the scene, but was presented to the jury as directly supporting Petitioner's guilt. *See infra* at 9. The Fourth Circuit's ruling that the admission of such evidence could be affirmed as circumstantial evidence is directly contrary to the Tenth Circuit's ruling in *Jefferson*. Simply put, under the Tenth Circuit's decision in *Jefferson*, improper hearsay evidence that was admitted and used to prove the truth of the matter asserted at trial may not on appeal be approved as circumstantial evidence. *See Jefferson*, 925 F.2d at 1252-53. The Fourth

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[4] The Government also suggests that the Fourth Circuit did not actually rule that the note, even if inadmissible hearsay, was properly admitted as circumstantial evidence. Petitioner respectfully submits that a fair reading of the Fourth Circuit's opinion indicates that the Fourth Circuit did so rule, and therefore Petitioner addressed this additional basis for granting certiorari.

Circuit's decision to the contrary is not only irreconcilable with *Jefferson*, it is also manifestly incorrect as a matter of law.

III. The Improper Admission of the Note Was Clearly Harmful Error

The Government incorrectly contends that certiorari should not be granted in this case because the error in admitting the note was harmless. *See* Govt. Br. at 10-11 & n.4. This argument ignores both the facts of this case and the applicable standard.[5]

The erroneous admission of the hearsay note in this case violated Mrs. Grady's rights under the Confrontation Clause. Mrs. Grady was unable to cross examine the unidentified author of the note at trial. Moreover, the note possesses no "particularized guarantees of trustworthiness" such as would render examination of its anonymous author of "marginal utility." *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980); *Idaho v. Wright*, 497 U.S. 805, 820 (1990). Therefore, the applicable standard is whether the error was harmless beyond a reasonable doubt. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986). Under that standard, the "question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967).

The error in this case clearly contributed to Mrs. Grady's conviction and was harmful under any standard. At trial the Government relied heavily on the evidence of the note. The note was "blown up" and displayed before the jury. In the portion of its closing argument that addressed the case against Mrs. Grady, the Government emphasized the note as direct

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[5] The Fourth Circuit, having affirmed the admission into evidence of the note, did not rule whether the error would have been harmless.

evidence of guilt. The prosecutor stated to the jury during his closing argument in reference to the note: "And, finally, . . . on this letter put on the chart, addressed to 'Lit,' 'So give me five rocks,' you don't ask somebody to give you something unless they have it, ladies and gentlemen." Tr. 10/19/95, at 1-43; *see also id.* at 1-10 to 1-11. Indeed, although the Government now asserts that the note "cannot be said to have affected the outcome of the proceedings" (Govt. Br. at 11), at trial, in arguing for its admission, the Government asserted that the note had "great evidential value." Tr. 10/18/95, at 2-66.

Moreover, the evidence against Mrs. Grady in this conspiracy case was far from substantial. In a conspiracy that allegedly lasted more than a year and comprised 16 transactions, Mrs. Grady was taped on only three occasions. On two of these occasions Mrs. Grady merely handed the telephone to another person. The Government quotes the Fourth Circuit's characterization of these calls as evidence of "direct participation" in the transactions subsequently arranged between the caller and the person to whom Mrs. Grady handed the phone. That characterization is plainly incorrect.[6]

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[6] There is no official transcript of the tapes. The tape of September 14, 1994, records a voice identified at trial as Mrs. Grady's answering the phone, the government informant asking "Can you do 5?" and the voice identified as Ms. Grady's replying, "I didn't hear you" and "Uh-uh," at which point the government informant says to "put Robert on." The caller then negotiates the transaction with Robert. The tape of December 8, 1994, is similar. Mrs. Grady answers the phone and apparently does not hear or does not understand what the government informant wants when he asks if "anything is going on down there" and says he wants "to pick something up." Mrs. Grady merely says "Like what?" and "Huh?" and passes the phone to another person.

Furthermore, the jury was initially undecided as to Mrs. Grady's guilt. The jury came out of its deliberations to request to hear again the tapes brought into evidence against Mrs. Grady and "any evidence pertaining to Mrs. Grady." Tr. 10/20/95, at 12-21. The jury's perception of these tapes and what was said on them was certainly influenced by the erroneously admitted evidence of the note.

In attempting to argue that the error here was harmless, the Government cites out of context the statement by Mrs. Grady's trial counsel that the note did not add much to the evidence against Mrs. Grady. This statement was made by trial counsel in arguing that the unsigned, undated note had little demonstrable relevance to the conspiracy charged, but would be extremely prejudicial and should be excluded under Federal Rule of Evidence 403. Tr. 10/18/95, at 2-63 to 2-65. Thus, far from conceding that the note was harmless, trial counsel's argument was that admission of the note would cause extreme unfair prejudice and harm to Petitioner. *See id.*

In sum, it is substantially probable that the erroneous admission of the unsigned, undated hearsay note into evidence affected the outcome of the trial in this case and was harmful under any standard.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully Submitted,

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